

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling of)	CC Docket No. 01-92
T-Mobile USA, et al.)	
)	DA 02-2436
Petition of US LEC Corp. for Declaratory)	
Ruling Regarding LEC Access Charges for)	
CMRS Traffic)	

**COMMENTS OF THE MONTANA
LOCAL EXCHANGE CARRIERS
ON PETITIONS FOR DECLARATORY RULING**

Pursuant to the Commission’s Public Notice requesting comments, the Montana Local Exchange Carriers (“Montana LECs”) respectfully submit these comments on the Petition for Declaratory Ruling filed by US LEC Corp. and the Petition for Declaratory Ruling filed by T-Mobile and other CMRS carriers (“CMRS Carriers”).¹ The Montana LECs² are all rural local exchange carriers in Montana which terminate CMRS-originated traffic delivered through the facilities of the local Regional Bell Operating Company (“RBOC”).

US LEC, in its Petition, seeks a declaratory ruling that local exchange carriers may assess access charges on interexchange carriers that utilize LEC networks to complete calls that originated from or terminated to the handsets of CMRS subscribers.

The CMRS Carriers, in their Petition, seek a declaratory ruling invalidating, at least prospectively, tariffs approved by state public utility commissions that set forth

¹ Comments Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic, DA 02-2436, CC Docket No. 01-92 (rel. Sept. 30, 2002).

² The Montana LECs are: 3 Rivers Telephone Cooperative, Range Telephone Cooperative, InterBel Telephone Cooperative, Northern Telephone Cooperative, Ronan Telephone Company, Lincoln Telephone Company, Hot Springs Telephone Company, Blackfoot Telephone Cooperative, and Clark Fork Telecommunications.

terms and conditions under which CMRS carriers may purchase call termination services from LECs. The CMRS Carriers do not identify the specific LECs whose tariffs are the target of their Petition, nor do they supply for the Commission's review copies of these tariffs or state commission orders considering them.

I. The US LEC Petition.

The Montana LECs urge the Commission to grant the US LEC Petition. The Commission's rules mandate that interexchange carriers that utilize the networks of local exchange carriers to complete calls pay access charges (a/k/a as "carrier's carrier charges") for such service: "Carrier's carrier charges shall be computed and assessed on all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."³ The Commission, in its 1996 Local Competition Order, recognized that access charges would continue to apply to intra-MTA CMRS-originated calls involving an interexchange carrier.⁴

State statutes, regulations, and tariffs will in many cases provide a similar result for intrastate calls. In a case involving intra-MTA CMRS-originated calls routed to the Montana LECs through the interexchange facilities of the RBOC (Qwest), the U.S. Court of Appeals for the Ninth Circuit recently held that rural LEC state tariffs must be interpreted to determine whether CMRS-originated traffic is subject to access charges to be imposed upon the RBOC providing the interexchange service.⁵ As the Montana

³ 47 C.F.R. Sec. 69.5(b). "Carrier's carrier" charges are access charges imposed on interexchange carriers, as opposed to the subscriber line charge, which is imposed on end users.

⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC. Rcd. 15499, para. 1043 (1996) (judicial review history omitted) ("Local Competition Order").

⁵ *3 Rivers Tel. Coop., Inc. v. U.S. West Communications, Inc.*, No. 01-35065, 2002 U.S. App. Lexis 18196 (9th Cir., 2002) (unpublished); *rev'g*, 125 F.Supp.2d. 417 (D. Mont. 2000).

LECs support the US LEC Petition, they reserve the right to file replies to comments opposing the Petition.⁶

II. The CMRS Carriers' Petition

As is shown in the accompanying Motion to Dismiss, the CMRS Carriers have not complied with the Commission's rules applicable to requests to invalidate state tariffs and their Petition must therefore be dismissed. The CMRS Carriers have not initiated formal complaints to be served on the LECs whose tariffs are targeted for invalidation, as called for by the Commission's *Logically* decision.⁷ Furthermore, the CMRS Carriers have not complied with the Commission's requirement that petitions to preempt state law (which would include state-approved tariffs and state orders approving or requiring the filing of such tariffs) be served on the state agencies whose authority would be preempted.⁸

In addition to these procedural defects, the Petition wholly overlooks at least three key points on the merits:

1. CMRS Carriers Cannot be Compelled to Negotiate Interconnection Agreements.

First, a ruling invalidating tariffs governing call termination service would eliminate the major incentive that rural LECs have to spur CMRS carriers to commence good faith negotiations. Because they are not LECs, CMRS carriers cannot be compelled to negotiate interconnection agreements or to submit to state commission arbitration where negotiations

⁶ The Montana LECs read the Petition as applying only to the normal situation in which the LEC provides substantial facilities to carry the call and so is deserving of compensation, and support the Petition with that understanding. The Montana LECs believe that a precise definition of the traffic that is the subject of the Petition is important and reserve the right to comment further as this definition develops and other issues arise.

⁷ *In the Matter of Communique Telecommunications, Inc., d/b/a Logically*, 14 FCC.Rcd. 13635, 13649 (rel. Aug. 9, 1999).

⁸ 47 C.F.R. Sec. 1.1206(a) Note 1.

fail or never take place.⁹ This makes the ability to file a tariff a critical alternative for rural carriers, to avoid the provision of service without compensation.

The lack of any incentive for the CMRS carrier to voluntarily negotiate stems from the technical ability of CMRS carriers to route traffic through RBOCs to rural LECs without first making arrangements with the rural LEC to pay for the traffic and the RBOC's concurrent refusal to pay the rural LEC for terminating this traffic.¹⁰ Rural LECs often cannot block the portion of the traffic coming from RBOCs that was originated by a CMRS carrier. Consequently, unless the ability of rural LECs to file tariffs that sets forth terms that apply in the absence of an approved interconnection agreement is preserved, the CMRS carriers have every incentive to (1) refrain from negotiating an interconnection agreement or take unreasonable positions in such negotiations, (2) send increasing volumes of traffic over the indirect interconnection, and (3) resist payment on the basis that no tariff or agreement exists that obligate them to pay.¹¹ The end result of this scenario can often be the provision of rural services without any compensation whatsoever from wireless carriers.

The Montana LECs have now had several years of experience with this problem. There are at least nine CMRS carriers and 16 rural LECs operating in Montana, but there are

⁹ The duty to negotiate interconnection agreements under Section 251(c)(1), like the duty to make arrangements for the termination of calls under Section 251(b)(5), applies only to local exchange carriers. See 47 U.S.C. Secs. 251(b) and (c). This Commission has ruled that CMRS carriers are not local exchange carriers for purposes of these Section 251 duties. Local Competition Order, 11 FCC Rcd. 15499, Para. 1004. Arbitration can occur only if an incumbent local exchange carrier first receives a request from the CMRS carrier to negotiate an interconnection agreement, which would never occur if the CMRS carrier chooses not to request arbitration. See 47 U.S.C. Sec. 252(b)(1). So long as service is being provided without a tariff or contract obligating payment, the CMRS carriers have absolutely no incentive to seek a change in the status quo.

¹⁰ The CMRS-originated traffic is delivered by the RBOC to the small rural LEC intermingled with other traffic that the RBOC requests the rural LEC to terminate.

¹¹ The other means to properly balance the incentives is to continue to permit the rural LEC to charge the RBOC for terminating CMRS-originated interexchange traffic that the RBOC delivers to the rural LEC. The RBOC can then pass through those charges along with its own charges when billing the CMRS carrier. Because the connection between the CMRS Carrier and the RBOC is direct (and can be removed for non-payment), the CMRS carrier cannot avoid paying the RBOC. The recent Ninth Circuit opinion cited above concerns RBOC responsibility to pay for this traffic.

only a handful of interconnection agreements between a CMRS carrier and a rural LEC in place in the state. As the RBOC (Qwest) has confirmed to the Montana LECs, CMRS carriers are instead routing increasing volumes of traffic through the RBOC to the rural LECs.¹² Moreover, as CMRS carriers have realized the advantages of this routing, little if any traffic is sent pursuant to negotiated interconnection agreements (and thus little traffic is measured or billed) while overall wireless calling in the state has increased substantially.

2. The Commission Should not Strip State Commissions of Their Authority under the Rural Exemption Provisions of Section 251 of the Communications Act.

In the Telecommunications Act of 1996, Congress granted small rural local exchange carriers an exemption from the six duties listed in Section 251(c), including the duty under Section 251(c)(1) to negotiate interconnection agreements.¹³ Congress through Section 251(f)(1) empowered state commissions to decide whether and when to terminate this “rural exemption” from Section 251(c) duties in specific cases.

Because many small rural LECs are still exempt under Section 251(f)(1) from the duty to negotiate interconnection agreements, but are fully subject to various interconnection obligations under Section 251(a) and Section 251(b), some means other than interconnection agreements must be used to implement these interconnection obligations. Thus, rural LECs have filed tariffs in several states. One Montana LEC (Ronan Telephone Co.) has actually

¹² Ronan Telephone in particular has experienced dramatic increases in traffic over Qwest’s trunk in recent months, which includes wireless traffic, which may confirm an escalation of this trend.

¹³ See 47 U.S.C. § 251(f)(1) (“Subsection (c) of this section shall not apply to a rural telephone company until the state commission lifts this exemption”).

been ordered to file such a tariff by its state commission.¹⁴ The LEC tariff filings have resulted in contested tariff cases in which the state commission (much as it does in an interconnection arbitration) considers the contentions of the CMRS carrier and the small rural LEC to decide whether the terms of the state tariff are reasonable under federal and state law. Such proceedings have occurred in Montana, Iowa, Missouri, and perhaps other states. There is no evidence that the state commissions cannot be expected to decide concerning these state tariffs fairly, and the CMRS carriers in their Petition cite several successes they have had in these cases.

Were the Commission to grant the requested declaratory ruling and require the use of interconnection agreements rather than tariffs, the Commission would effectively be lifting, on a nationwide basis, the rural exemption in Section 251(f)(1) from the duty to negotiate interconnection agreements. However, under Section 251(f), the power to lift that exemption lies exclusively with the state commissions. Particularly given the objective of maintaining good working relationships with the state commissions in implementing the 1996 Act, there is no reason for the Commission to take such a drastic step, even if Congress had authorized the Commission to do so.

3. Tariffs are the Most Practical Solution Where Low Traffic Volumes Make Negotiation of Interconnection Agreements Cost Prohibitive.

Finally, the CMRS Carriers correctly note that in some cases the traffic volume between an individual CMRS Carrier and an individual small rural LEC will be too small to justify the expense of interconnection negotiations. The filing of a tariff approved by the state commission solves this problem by putting in place one set of publicly available rules governing service to all CMRS carriers, thereby avoiding the expense of carrier-by-carrier negotiations. This achieves the underlying purpose of the rural exemption, which is to

¹⁴ See *Order Directing Tariff Filing*, Docket No. D200.1.14, Order No. 6225 (Mont. P.S.C., Jan. 25, 2000) (“Ronan is directed to file a tariff, by February 8, 2000, containing the rates, terms, and conditions that will apply to reciprocal compensation arrangements with requesting telecommunications carriers.”). A copy of this Order is attached.

reduce the costs borne by small rural carriers in fulfilling their duties under the 1996 Act. Costs for all parties can be reduced still further where a state association of rural LECs files a tariff on behalf of all of its members. Low traffic volumes are thus a critical practical reason supporting the use of tariffs – not a reason for allowing CMRS carriers to avoid paying for the rural LEC call termination services that they undeniably utilize in some volume, small or large.

Conclusion

For the reasons stated above, the Montana LECs respectfully request that this Commission grant the declaratory ruling requested by US LEC and deny the declaratory ruling requested by the CMRS Carriers.

Respectively submitted

The Montana Local Exchange Carriers

By their counsel

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Dated October 18, 2002

ATTACHMENT

Service Date: January 26, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF a Tariff Filing)	UTILITY DIVISION
By Ronan Telephone Company Containing the)	
Rates, Terms and Conditions for Reciprocal)	DOCKET NO. D2000.1.14
Compensation Pursuant to 47 U.S.C. § 251(b)(5))	
and § 69-3-834(2)(b), MCA)	ORDER NO. 6225

ORDER DIRECTING TARIFF FILING

Introduction and Background

On April 28, 1999 Blackfoot Telephone Cooperative, Inc. (Blackfoot) and Montana Wireless, Inc. (MWI) filed petitions for arbitration of a reciprocal compensation arrangement with Ronan Telephone Company (Ronan). See Docket Nos. D99.4.112 and D99.4.113. The arbitrations were suspended pending the disposal of a petition filed by Ronan pursuant to 47 U.S.C. § 251(f)(2). See Docket No. D99.4.111. On December 22, 1999 the Montana Public Service Commission (Commission) issued Procedural Order Nos. 6218 and 6219, directing that the arbitrations proceed. On that same date Ronan filed a Motion to Dismiss the arbitrations, which the Commission has granted. See Order Nos. 6218a and 6219a, Docket Nos. D99.4.112 and D99.4.113, January 25, 2000.

Discussion

Although the Commission granted Ronan's Motion to Dismiss the arbitrations, see the discussion at Order Nos. 6219a and 6219b, Ronan continues to have a duty under Montana and federal law to establish reciprocal compensation arrangements for those carriers that request them. 47 U.S.C. § 251(b)(5); § 69-3-834(2)(b), MCA; Commission Order Nos. 6219a and 6219b, Conclusions of Law, 5. Ronan acknowledges this duty. Ronan Motion to Dismiss, Docket Nos. D99.4.112 and D99.4.113, p. 4, fn. 3, December 22, 1999. Blackfoot and MWI, by their requests for negotiation and arbitration, have indicated a desire for a reciprocal compensation arrangement with Ronan, an arrangement they are entitled to by law. Therefore, the Commission will direct that Ronan file a tariff, providing the details of a reciprocal compensation arrangement that will be available to interconnecting carriers desiring such an arrangement.

Conclusions of Law

1. Ronan Telephone Company is a public utility subject to the jurisdiction of the Montana Public Service Commission. §§ 69-3-101(f) and 69-3-102, MCA.

2. Ronan Telephone Company has a duty to establish reciprocal compensation arrangements with telecommunications carriers who request them. 47 U.S.C. § 251(b)(5); § 69-3-834(2)(b), MCA.

Order

Ronan Telephone Company is directed to file a tariff, by February 8, 2000, containing the rates, terms and conditions that will apply to reciprocal compensation arrangements with requesting telecommunications carriers. In preparing the tariff Ronan must be guided by and comply with the rules of the Federal Communications Commission on reciprocal compensation, 47 C.F.R. §§ 51.701-51.717.

DONE AND DATED this 25th day of January, 2000, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chair

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST: Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.
A motion to reconsider must be filed within ten (10) days. See 38.2.4806,
ARM.

CERTIFICATE OF SERVICE

I, Adrian B. Copiz, hereby certify that on October 18, 2002, I caused copies of the foregoing Comments electronically filed with the FCC to be served on the following:

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